Date: June 12, 1997

Case No.: 95-STA-29
ARB 96-198

In The Matter Of:

**Robert Michaud**,
Complainant

v.

**BSP Trans., Inc.**,
Respondent

Appearances:

Louis B. Butterfield, Esq.
For the Complainant

Lawrence C. Winger, Esq.
For the Respondent

Before:
**DAVID W. DI NARDI**
**Administrative Law Judge**

## RECOMMENDED DECISION AND ORDER ON REMAND

This case arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STA"), 49 U.S.C. §2301 **et seq.** Robert Michaud (hereinafter "Complainant") filed a complaint which alleged that BSP Transport, Inc. (hereinafter "Respondent") discriminated against him by discharging him because he made safety complaints. The Administrative Review Board found Complainant stated a valid cause against Respondent and has remanded the case to the Office of Administrative Law Judges solely on the issue of damages.

## Post-Hearing Evidence

Post-hearing evidence has been admitted as follows:

| Exhibit | Content | Date Filed |
|---|---|---|
| EX A | **Order of Reassignment** from Judge Moore to Judge DiNardi | 01/29/97 |
| EX B | **Notice of Hearing and Pre-Hearing Order** | 02/07/97 |
| EX C | Letter from Attorney Butterfield requesting clarification of Notice of Hearing and Pre-Hearing Order | 02/24/97 |
| EX D | Letter from Attorney Butterfield with Motion for Modification of Pre-Hearing Order and Notice of Hearing; Memorandum of Law in Support of said Motion; Proposed Order; and Certificate of Service Enclosed | 03/10/97 |
| EX E | **Order** Canceling Hearing and Establishing Briefing Schedule | 03/11/97 |
| EX F | Letter from Attorney Winger objecting to cancellation of hearing | 03/17/97 |
| EX G | Letter from Attorney Butterfield with | 04/14/97 |
| EX H | Complainant's Brief on Remand enclosed | 04/14/97 |
| EX I | Letter from Attorney Winger with | 04/14/97 |
| EX J | Respondent's Brief on Remand enclosed | 04/14/97 |
| EX K | Letter from Attorney Winger in regards to date for filing reply to Complainant's request for fees and costs | 04/23/97 |

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| EX L | Letter from Attorney Winger with | 05/14/97 |
| EX M | Respondent's Memorandum In Opposition to Complainant's Request for Fees and Costs enclosed | 05/14/97 |
| EX N | Letter from Attorney Butterfield with | 05/30/97 |
| EX O | Complainant's Memorandum in Response to Respondent's Opposition to Request for Fees and Costs Enclosed and | 05/30/97 |
| EX P | First Supplement to Complainant's Petition for Award of Attorneys' Fees and Costs and | 05/30/97 |
| EX Q | Second Affidavit of Louis B. Butterfield Enclosed | 05/30/97 |
| EX R | Letter from Attorney Winger with | 06/11/97 |
| EX S | Respondent's Memorandum in Opposition to Complainant's Supplemental Request for Fees and Costs | 06/11/97 |

The record was closed on June 11, 1997 as no further documents were received.

## Procedural History

Complainant filed a complaint of discrimination pursuant to Section 405 of the Act with the Department of Labor, alleging he was discharged by Respondent for having complained of hours of service violations. The complaint was investigated and found to have merit, and on April 10, 1995, the Secretary issued his Findings and Preliminary Order. Respondent timely filed objections and requested a hearing pursuant to 49 U.S.C. §31101(c)(2)(a). The case went to hearing before Administrative Law Judge Christine Moore on February 20, 1996 in Bath, Maine.

Judge Moore issued a **Recommended Decision and Order** on September 6, 1996 in which she recommended dismissal of the claim. In that proceeding, the parties agreed to a number of stipulations, only some of which are relevant to this remand proceeding. In particular, the parties stipulated to the following:

1. Complainant's employment with Respondent began on July 7, 1993 and ended on December 23, 1993.

2. His wage rate at the time of termination was $9.50 per hour.

3. Had Complainant continued employment with Respondent after December 23, 1993, he would have

   a. received two raises: (1) to $10.00 per hour effective Week 21 of 1994; and (2) to $10.50 per hour effective Week 16 of 1995;

   b. been entitled to receive pay at a time and one-half rate for hours worked over 45 hours per week;[1]

   c. received, beginning January 1, 1994 and continuing until December 1995, health insurance having a net value to Complainant of $369.00 per month, or $85.15 per week. Beginning January 1996 and continuing to the present, the net value of such health insurance rose to $399.00 per month, or $92.08 per week;

   d. worked the following average hours per week:

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|---|---|
| Last week of December 1993 to March 1994: | 53.13 |
| April 1994 to December 1995: | 50.85 |
| January 1996 to present: | 50.75 |

   e. been entitled to back wages from December 23, 1993 through December 31, 1995 in the amount of $66,204.38. Back wages from January 1, 1996 and continuing are $655.14 per week; and

   f. Had Complainant accepted Respondent's offer of reinstatement dated May 1, 1995 he would have returned to work in week 19 of 1995.

Complainant objected to the Recommended D&O and filed a memorandum in opposition on October 18, 1996. The Assistant Secretary of Labor for Occupational Safety and Health intervened and also submitted a memorandum in opposition to the Recommended D&O.

On January 6, 1997 the Administrative Review Board issued a **Decision and Remand Order** (hereinafter "DRO"), which Order disagreed with Administrative Law Judge Moore's recommendation that the complaint be dismissed. The ARB held that the stated legitimate reason for firing Complainant was not credible and that Complainant had established by a preponderance of the

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[1]The Board inquired in its DRO as to the reason for the parties stipulating to overtime pay for hours worked over 45 hours per week. Respondent explains over-the-road tractor-trailer truck drivers are exempt from the overtime pay requirements of the Fair Labor Standards Act and that Respondent, nevertheless, voluntarily pays its employees at an overtime rate for those hours worked over 45 hours per week. (Respondent's Brief, at p. 4)

evidence that he was discharged for engaging in protected activity. The ARB then remanded to Judge Moore for "any further proceedings she deems necessary" and "a supplemental recommended decision on the full complement of remedies to which [Complainant] is entitled." (DRO, at p. 7)

The Board, relying on the remedial section of the Act, 49 U.S.C. §31105(b)(3)(A), held "[Complainant] is entitled to an order requiring [Respondent] to take affirmative action to abate the violation, reinstate him to his former position with the same pay and terms and privileges of employment, and compensatory damages, including back pay. The Board may also assess against [Respondent] the costs, including attorney's fees, reasonably incurred in bringing the complaint." (DRO, at p. 7) The Board then noted the parties had stipulated to the amount of back pay; that Complainant had declined an offer of reinstatement in May 1995, which may affect the accrual of potential back pay liability; and that Respondent disputes whether Complainant's depression and related injuries were proximately caused by his discharge. Finally, the Board instructed Judge Moore to accept a detailed petition for costs and attorney's fees and to await Respondent's comments on those amounts. (DRO, at p. 8)

On January 24, 1997 Chief Administrative Law Judge Vittone issued an **Order of Reassignment**. That Order informed all parties concerned that this matter was being reassigned to the undersigned because Judge Moore was no longer available to the Office of Administrative Law Judges.

This Judge then issued a **Notice of Hearing and Pre-hearing Order** informing all parties that a remand hearing would be held on April 8, 1997. On March 11, 1997 this Judge issued an **Order Canceling Hearing and Establishing Briefing Schedule**.

## Respondent's Objection to Cancellation of Hearing

Respondent, by letter dated March 13, 1997, has objected to this Judge's cancellation of the hearing on remand. Respondent reiterates that objection in its brief on the issue of damages. (Respondent's Brief, at pp. 1-3) Respondent asserts that "much of the Complainant's testimony is self-serving, shaped to fit the claims he asserts, and rambling or unresponsive." (Respondent's Brief, at p. 2) Stressing the fact that Judge Moore did not find Complainant to be a credible witness, Respondent suggests this Judge cannot now decide the issue of appropriate damages without the benefit of making my own credibility determinations. Accordingly, the Respondent requested this Judge listen to tapes of the original hearing, that I certify that I did so, and that I foreclose an award of any damages for that period after February 22, 1996, the date on which the hearing before Judge Moore concluded.

It is clear that every remand mandate should be strictly followed within the confines of the mandate order. **See Tritt v. Fluor Constructors, Inc.**, 88-ERA-29 (ALJ 8/29/94). It is equally clear, however, that where a remand mandate is issued with directions to accomplish a certain act, but without indicating how the act shall be performed, there exists a large measure of discretion in

the performance of the act. **Id.** An administrative law judge has broad discretion in his or her implementation of a remand order where the direction from the reviewing authority is not specific. In this case, the Board remanded on the issue of damages and generally directed Judge Moore to initiate any proceedings she deemed necessary. The mandate of this remand is not expanded or lessened by virtue of the reassignment to the undersigned. While this Judge will not have had the benefit of hearing the live testimony of the Complainant, such is not necessary as the Administrative Review Board has held, as a matter of law, that Complainant has established a prima facie case that he had engaged in protected activity, that he was illegally terminated because of such protected activity and that the sole remaining issue is the remedy to which Complainant is entitled.

Accordingly, the present posture of this matter does not necessitate a hearing on remand. As will become evident in the statement of facts and application of law which follows, there is sufficient, independent evidence apart from Complainant's testimony, which Respondent contends is not credible, to support the following damages. Therefore, my decision would be unchanged even if I were to completely discredit Complainant's testimony at hearing. Respondent's requests, therefore, are hereby **DENIED**.

## I. Facts Relevant to the Issue of Damages

The Complainant was terminated from Respondent corporation on December 23, 1993. Complainant testified at hearing that upon termination, he started "applying for jobs left and right and filling out new applications of places I had already been before, before I got with BSP." (TR 140) Although Complainant could not recall the names of all the employers with which he sought employment, he did proceed to specifically name a number of employers within the trucking industry (TR 140-142), and also testified to the names of employers with which he applied for non-trucking jobs. (TR 141) Complainant testified he was required by unemployment to fill out at least three (3) applications per week and Complainant states he did just that until June of 1994. (TR 141) The job search continued, according to Complainant, from the time he was terminated in December 1993 to February 1995. (TR 143)

Complainant testified he ended his job search in February 1995 because "something snapped." (TR 144) Complainant's "mind started racing, and I started forgetting things. And I didn't feel like I was capable to do much anymore at that time. ...And then the Doctor checked me out." (TR 144)

On or about May 1, 1995 Respondent extended to Complainant an offer of reinstatement. (RX 12) There is, in fact, corroborating evidence that Complainant did receive the letter and actually consulted his physician about the offer. (TR 379) The offer of reinstatement was copied to Complainant's counsel of record on or about May 5, 1995 and Respondent followed-up on the offer with a letter dated May 22, 1995. It is apparent that Complainant's counsel relayed to Respondent, during a telephone call on May 26, 1995, that Complainant was unable to return to work at Respondent corporation as a driver or in any other capacity due to doctor's orders. (RX 12)

Complainant testified at hearing that he received the offer of reinstatement in May 1995 (TR 169; 266), and that he did not know whether the offer of reinstatement was for a driving position or any other job. (TR 266-67) Nevertheless, Complainant states he did not feel capable of performing his job duties correctly because he was forgetting things, having a hard time reading small print, and things were racing in his mind. (TR 170) He was also worried Respondent would try to find a way to get rid of him. The offer of reinstatement was discussed with Dr. Farrand, who advised Complainant that he perhaps could take a job with another company, but not with Respondent. (TR 170; 273) The Doctor, Complainant testified, advised that a job with Respondent would be too stressful. (TR 170)

The medical report of Dr. Merill R. Farrand, Jr., who has provided primary care for Complainant since February 9, 1995, was admitted into evidence at hearing. (CX 9) Dr. Farrand, who also testified at hearing, has been a solo private practitioner in Kennebunk, Maine, since 1985 and has medical training in a broad background of rotations involving a variety of fields, including psychiatry.

Dr. Farrand first examined Complainant on February 9 or 10, 1995 when Complainant reported for treatment of a rash. Symptoms suggestive of depression were first noted by Dr. Farrand during a March 9, 1995 office visit. The Doctor states that this does not mean the depression did not exist prior to that time. The March 1995 visit is, however, the visit during which the Doctor attempted to elicit information concerning Complainant's psychological status. (TR 392) Complainant expressed "concerns with significant stress, including a lack of job, financial concerns of lack of money, feeling degraded by the usage of community services, and indicating that he had to sell his house." (CX 9) Dr. Farrand diagnosed major depression at that time, initiated therapy with Paxil, and has seen Complainant on an every month to two month basis since that time. Dr. Farrand summarizes a variety of physical concerns, such as gastric distress and chronic headaches,[2] and notes the symptoms which Complainant demonstrated to establish a diagnosis of depression. Among other symptoms, the Doctor notes Complainant reported depressed mood on a daily basis and agitation, both of which the Doctor states were also reported to him by Complainant's wife and an unnamed family friend. (CX 9, at p. 2) Dr. Farrand continues in his report

> As other objective evidence of his depression, he completed a Zung scale rating for depression on July 27, 1995. His raw score for this test was a 57, which provides an SDS index of 71. The equivalent clinical global impression of this scoring is that of the presence of severe to extreme depression. The prognosis for this depression ending soon seems quite guarded, as he has failed to respond to several anti-depressive medications, as well as counselling [sic]. I anticipate that his continued feelings of worthlessness and inability to control his future are marked reasons for his

[2]The Doctor states these physical ailments may, or may not, have been worsened by the depression. (TR 374) The Doctor was more certain, however, that complaints of chest pain, for which the Doctor recommended cardiology evaluation, were related to anxiety caused by the depression. (TR 374-75)

> depression continuing. I believe that Mr. Michaud's depression has been either caused by or significantly contributed to by the loss of his last employment as a truck driver. I am unaware of any pre-morbid condition prior to that time, as I did not provide any care for him, and no information had been provided that this problem had existed prior.

(**Id.**) Later in the report, Dr. Farrand states "I believe that [Complainant's] loss of employment as a truck driver is either the sole or a major contributor" to the major depression from which Complainant suffers (CX 9; TR 375), and that, in Dr. Farrand's opinion, Complainant did not magnify the potential causes of his depression. (TR 399-400) Dr. Farrand opined at hearing that Complainant's depression was caused by feelings of loss of control in his life, loss of home, bankruptcy-type issues, inability to find a job, and a lot of guilt and loss of self-worth. (TR 373) The report states Dr. Farrand's opinion that Complainant's depression has not significantly changed since care was initiated.

The report reflects Dr. Farrand's opinion that Complainant would be unsafe in an employment situation where he would be driving a commercial vehicle due to Complainant's limited attention span and expresses concern that Complainant may not be able to fulfill any employment due to the degree of depression. The Doctor also confirmed this opinion at hearing, where he testified he did not believe the Complainant was capable of working "right now." (TR 375) The Doctor states "I, in fact, believe [Complainant] is having difficulty functioning through the normal activities of daily living at this time." (CX 9)

Dr. Farrand recalls Complainant asking whether he should go back to work for Respondent, as a driver or otherwise, and the Doctor recalls advising Complainant that he should not.[3] The Doctor, who admittedly did not know the specifics of the offer of reinstatement but who did know Complainant had not worked for Respondent since late 1993 or early 1994, held the opinion that returning to the Respondent's work environment would not be conducive to Complainant's well-being. (TR 376; 381; 384) This opinion, the Doctor testified, was based on Complainant's degree of depression, on Complainant's losing his job because he was unwilling to drive extra hours, on Respondent's treatment of Complainant during that initial loss, and on Complainant's feeling of being blacklisted from the truck driving industry. (TR 376-77; 396) The Complainant did not, however, give the Doctor the facts behind his feeling that he was being blacklisted from the industry. (TR 386-87) The Doctor summarized that although it would have made good economic sense for the Complainant to take the offer of reinstatement, it would not have made good psychological sense based on Complainant's feelings towards and perceptions about the Respondent. (TR 396)

The testimony at hearing also establishes that Dr. Farrand did not prohibit Complainant from returning to work for another employer. Dr. Farrand, indeed, testified that he believed that Complainant did have some capacity to work in May 1995. (TR 381-82) In comparison, the Doctor

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[3]I note the Doctor testified he did not advise Complainant to obtain another medical opinion on this issue. (TR 382)

expressed his opinion that at the time of hearing in May 1996, the Complainant would not be capable of working unless there were adjustments to a potential occupation to allow a transition. (TR 382) On this note, Dr. Farrand testified Complainant is in a vicious cycle where he cannot work because he is depressed and yet he is depressed because he cannot work. (TR 391)

Furthermore, Dr. Farrand testified that he recalls Complainant getting excited and then disappointed over a potential job offer (TR 387-88) although, the Doctor testified, he could not place that event in time. Dr. Farrand testified this event did have some negative effect on Complainant, but the Doctor also states Complainant was already suffering from major depression. (TR 389)

Dr. Farrand's testimony concluded with his stating the prognosis for Complainant was "guarded." (TR 398) He also stated there has been some stabilization of Complainant's depression, that the anxiety has been controlled with medication, and that headache and stomach complaints have been reduced through antidepressants or other specific medications. (TR 397) The Doctor did testify that depression is usually of a finite period. In the end, however, the Doctor stated he did not "foresee, in the short term anyway, this [Complainant's] depression resolving." (TR 398)

The medical report and supporting medical records of Delphine Palmer, licensed master social worker in the state of Maine, were also admitted at hearing. (CX 8) The report indicates Ms. Palmer first evaluated Complainant on June 30, 1995, upon referral from Dr. Farrand, and indicates Ms. Palmer continued to see Complainant for 23 weekly therapy sessions which concluded on January 4, 1996.[4] The report states Complainant's referral to Ms. Palmer was "the result of [Complainant's] difficulty coping with the stressors of being fired from his job after his contact with DOT and OSHA." (CX 8)

In the report, Ms. Palmer states Complainant stated he was at counseling because his doctor thought he needed counseling. Complainant presented to Ms. Palmer with complaints of feeling depressed, reports of poor sleep pattern with frequent wakings, low motivation, and loss of energy. Throughout treatment, Complainant verbalized feelings of hopelessness, helplessness, anger, shame, and fears of the future. Ms. Palmer's report memorializes Complainant's "belief system that he was too old 'to start over' and that his life was ruined." (CX 8) Ms. Palmer summarizes that

> During Mr. Michaud's course of treatment he met the DSM-IV's criteria for a diagnosis of Major Depression including his self-report of: a) depressed mood most of the day, nearly every day, b) markedly diminished interest or pleasure in all or almost all activities, c) insomnia, d) fatigue or loss of energy nearly every day, e) feelings of worthlessness or excessive guilt, f) diminished ability to think or concentrate, or indecisiveness.
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> ... Throughout treatment, Mr. Michaud denied suicidal ideation or plan, stating on more than one occasion. [sic] 'If I can't lie because of my religion. [sic] then

[4]At this time, Complainant was transferred to another clinician for treatment.

> I sure won't commit suicide which is also against my religion.'...
>
> It would appear that Mr. Michaud felt his original act was a 'right and good thing' to do. However he did not anticipate the impact to whistle-blowing. He was naive about the ramifications of his actions and ultimately unable to deal with the snowballed accumulative effect....
>
> Mr. Michaud's high anxiety, poor concentration, feelings of hopelessness, helplessness, shame and past unsuccessful attempts at seeking employment all had an adverse affect on his ability to gain employment during the time that he participated in treatment with me."

(CX 8) (**See Also** TR 331; 343-352) Ms. Palmer diagnosed Complainant with major depression[5] (TR 360) and indicates in her report that Complainant was unable to move very far in treatment. (CX 8, at p. 2; TR 348) Indeed, Complainant continued to suffer from major depression on the date of Complainant and Ms. Palmer's last session.

At hearing, Ms. Palmer expressed her opinion that the causes of Complainant's depression were his self-reports of "losing his jobs, the results of the whistleblowing, the ensuing financial distress, as well as the foreclosure on his house, his feelings of hopelessness, helplessness, depression, poor sleep, agitation, anxiety, difficulty concentrating." (TR 344) She further stated that although Complainant saw himself as a victim, he did not blame Respondent for all his problems. The downward spiral of Complainant's condition was also attributed to his unemployment and financial distress. While Ms. Palmer stated the financial trouble was a major cause of Complainant's depression, she rooted that financial trouble in Complainant's initial termination and ensuing unsuccessful job search. (TR 349-50) Ms. Palmer later expanded on this opinion, stating that she did not distinguish between Complainant's job loss and inability to later find other employment. Rather, she viewed these events as a snowballing effect of the initial termination. (TR 351) Ms. Palmer also opined that, in her opinion, Complainant would not have experienced depression if he had found employment within a one to two month period of termination. (TR 351-52)

Upon Ms. Palmer's recommendation, Complainant was sent for psychiatric consultation with

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[5]Ms. Palmer concedes that impaired memory, impaired perception of reality, and blaming others for one's own problems are characteristics of major depression. She also stated, however, that Complainant never presented in such a way that she interpreted him to be delusional, nor did his recollections appear inaccurate. (**See Also** TR 398-99, expressing Dr. Farrand's similar opinion) Moreover, Ms. Palmer testified that she never formed the opinion that Complainant was wrongly blaming others because he tended to focus on his own guilt, **i.e.**, his inability to provide for his family and his feeling of being a failure.

Michael Garnett, M.D. Dr. Garnett examined Complainant on August 24, 1995.[6] The Doctor's psychiatric evaluation, also admitted at CX 8, indicates Complainant reported a history of depressive symptomatology since at least March 1994, which significantly worsened since December 1994. The evaluation further indicates "the determinants of his depression relate to being fired from his job 12/23/93." After summarizing the history of present illness, the Doctor rendered the following assessment

> Robert Michaud is...suffering from a major depression of moderate proportions without psychotic features occurring in the context of being fired from his job and the subsequent loss of status from the financial constraints that that has entailed combined with his inability to find work since then. He has had impairment in his interpersonal relationships in that he is uncomfortable and anxious around other people. He has lost ambition, has not been able to enjoy previously enjoyed activities and reports memory and concentration difficulties. There is also reported sleep disturbance, diminished appetite and loss of libido. Fortunately there is no suicidal ideation and he has no past history of attempts and there is no complicating alcohol or substance abuse.

(CX 8, Dr. Garnett's evaluation at p. 3) Doctor Garnett then rendered a diagnosis of "major depression, single episode, moderate, without psychotic features" and listed stressors as "fired from job, unable to find new employment, financial constraints, pending legal suits." (**Id.**)

At hearing, Ms. Palmer testified that, in her opinion and based upon Complainant's self-reports, Complainant was not capable of working at any job during the time he was treating with Ms. Palmer. (TR 345-46) She is, however, not able to form an opinion as to the date Complainant's depression rendered him incapable of working. (TR 353-54) Nor was she able to determine a date on which Complainant first started to suffer from major depression. (TR 364) Ms. Palmer admits that work would have been therapeutic in some settings, but also stated that Complainant was incapable of incorporating daily exercise into his daily activities. Complainant, Ms. Palmer states, felt he needed to be home to protect his family as the world crumbled around him. (TR 347)

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[6]The psychiatric evaluation of Dr. Garnett is of somewhat limited evidentiary value because the Doctor was not present at hearing to testify and be subject to cross-examination. This does not, however, deprive it of all value. This Judge has considered the evaluation as corroborating evidence in assessing the validity and accuracy of Ms. Palmer's diagnosis and assessment of Complainant's condition and as substantiation of Complainant's self-reports.

## II. Back Pay Liability

The Supreme Court has held that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential back pay liability." **Ford Motor Co. v. EEOC**, 458 U.S. 219, 241 (1982); **Lewis Grocer Co. v. Holloway**, 874 F.2d 1008, 1012 (5th Cir. 1989). The rejection of an unconditional offer of reinstatement, however, will not toll back pay liability where a special circumstance or valid reason exists for refusal of that offer. **Naylor v. Georgia-Pacific Corp.**, 875 F. Supp. 564, 581 (N.D. Iowa 1995). The issue, therefore, becomes whether an objective, reasonable person would have refused the offer of reinstatement. **See** DRO, at p. 8 (**Citing Morris v. American Nat'l Can Corp.**, 952 F.2d 200, 203 (8th Cir. 1991); **Fiedler v. Indianhead Truck Line, Inc.**, 670 F.2d 806, 808 (8th Cir. 1982)). The burden of proving an offer of reinstatement was made and that rejection of it was objectively unreasonable rests squarely on the shoulders of Respondent. **See Smith v. World Ins. Co.**, 38 F.3d 1456, 1465 (8th Cir. 1994). **See Also Maturo v. National Graphics, Inc.**, 722 F. Supp. 916, 928 (D. Conn. 1989).

Respondent has opposed the claim for back pay on the grounds that Complainant failed to mitigate his damages after discharge, that his back pay is limited due to his rejection of an offer of suitable work, and that his back pay is limited to the period ending with the first hearing. It is, however, possible for this Judge to decide two of these arguments almost as briefly as those arguments were raised and argued. **See** Respondent's Brief, at pp. 9-10, sections A and C (lacking in citation to case law and/or reference to testimonial or other evidence). I find and conclude that there is no validity to Respondent's first and third arguments.

A cursory review of the controlling authority indicates that Respondent bears the burden of proving that Complainant failed to mitigate his damages. **See Lansdale v. Intermodal Cartage Co., Ltd.**, 94-STA-22 (ALJ 3/27/95), at p. 26 (adopted by the Sec'y 7/26/95). To meet this burden, a respondent must establish that comparable jobs were available during the interim period and that a complainant failed to make reasonable effort to find new employment that was substantially equivalent to his or her former position and suitable to a person of his or her background and experience. **Id.** A complainant will be found to have breached his or her duty to mitigate damages only upon a determination that he or she showed a willful disregard for his or her own financial interest. **Id.** at p. 27 (**Citing Hufstetler v. Roadway Express**, 85-STA-8 (Sec'y 8/21/86), **aff'd sub nom.**, **Roadway Express v. Brock**, 830 F.2d 179 (11th Cir. 1987); **Polewsky v. B&L Lines**, 90-STA-21 (Sec'y 5/29/91)). **See Also Lansdale**, (Sec'y 7/26/95), at p. 3.

Respondent argues "[t]he record evidence shows that [Complainant] made a few brief efforts to find other work and then more or less gave up and rode out his unemployment compensation." (Respondent's Brief, at p. 19) This Judge, however, has reviewed uncontroverted evidence that Complainant applied for employment within and outside of the trucking industry between the time of termination and February 1995 and that Complainant filled out three applications per week between January and June 1994, as was required by unemployment. I might add that these statements are verifiable or, as Respondent would have it, impeachable. Nevertheless, there is no evidence of record so impeaching the testimony of Complainant, which testimony is corroborated by testimony from

Complainant's wife and, to some extent, all three treating medical professionals.

I decline to engage in a lengthy discussion of Respondent's suggestion that back pay liability ends as of the last day of the hearing in this case because it is wholly unsupported by law. Suffice it to say, such a position would contravene the remedial purpose of the STA by allowing a respondent to forestall a complainant's recovery of damages by seeking appeal and, at the same time, allow respondent to cut-off the accrual of damages for which it may ultimately be held liable. Indeed, there is authority which indicates back pack liability continues until a complainant is reinstated or declines the offer of reinstatement. **See Creekmore v. ABB Power Sys. Energy Services, Inc.**, 93-ERA-24 (Dep. Sec'y 2/14/96), at p. 20.

I shall now focus my attention on Respondent's argument that its unconditional offer of reinstatement cuts off its back pay liability. Respondent produced evidence at hearing that an offer of reinstatement was extended to Complainant on or about May 1, 1995. (RX 12; TR 379) Respondent then argues "[Complainant] declined the unconditionally offered job, not because of any 'special circumstance,' but because of his unfounded subjective fears." (Respondent's Brief, at p. 10) I find Respondent's statement to be conclusory and of no meaningful assistance to this Judge in determining the issue at hand.

Complainant submits an award of back pay from date of termination through date of final judgment is appropriate because of the existence of special circumstances justifying Complainant's rejection of the offer of reinstatement. Complainant makes some reference to the offer being less than bona fide. (Complainant's Brief, n. 3) Embarking upon an examination of Respondent's good faith or lack thereof, however, would be altogether academic given the fact that I find and conclude Complainant was disabled from accepting any such offer of reinstatement in the first instance.

In this regard, I have found the Eleventh Circuit's decision in **Lewis v. Federal Prison Industries, Inc.**, 953 F.2d 1277 (11th Cir. 1992), to be most instructive. In **Lewis**, there was evidence from plaintiff's treating psychiatrist and physician that both advised plaintiff not to accept the offer of reinstatement. **Id.** at 1278. The Court held that the employee reasonably refused the offer of reinstatement where he declined the employment because he was suffering from depression in response to the employer's discriminatory acts. In addition, there was uncontradicted evidence from the same psychiatrist that plaintiff could not return to work without suffering a return of the symptoms that so debilitated him in the first place. The Court then stated the most important factor in determining to award reinstatement or front pay was the evidence that the discrimination endured by plaintiff "in effect *disabled"* him. **Id.** at 1281 (emphasis in original).

This Judge finds and concludes that Complainant's rejection of Respondent's offer of reinstatement was objectively reasonable based on the testimony of Complainant himself and based on the highly persuasive testimony of Dr. Farrand. I find it difficult to imagine reasonable minds disagreeing as to whether a reasonable person, who is in a precarious mental state, on anti-depressant medication, and undergoing counseling on a weekly basis, would completely discard the advice of a treating physician and return to work for the employer alleged to have caused this condition. The

result achieved may be different were there evidence that a complainant never sought the advice of a treating physician and simply relied on his or her own personal, unskilled opinion that he or she was not able to return to work for the allegedly discriminating employer. This, however, is not the case at hand.

I pause to note that there is some evidence that Complainant was not sure whether the offer of reinstatement was an offer to return to Respondent's employ as a truck driver or in some other capacity. (TR 266) Indeed, there is some evidence that Dr. Farrand also did not know the particulars of the offer of reinstatement. (TR 381) I hasten to add, however, that this factor is not determinative of the outcome. Dr. Farrand also stated that he held the opinion that Complainant should not return to work for Respondent employer at the time of the offer of reinstatement, regardless of the capacity. (TR 381)

Furthermore, I have also given consideration to Dr. Farrand's testimony that Complainant was capable of working in February 1996, albeit in a modified environment. Whether such an ideal position was available at that time was left completely unaddressed by Respondent at hearing. Respondent failed to seize upon its opportunity at hearing to present evidence, as it was its burden to do, as to *available, comparable* jobs and/or *available* jobs for which Complainant was qualified.

Based upon this evidence, I find Complainant is entitled to an award of back pay from the date of his termination, December 23, 1993 through and including the date on which the Respondent pays such an award to Complainant. Respondent is not entitled to have its liability cut off at the date of its offer of reinstatement because I find and conclude that an objective, reasonable person would not have accepted Respondent's offer based on the advice of a treating physician, who advised that such a position would be too stressful for Complainant and that such a position would not make good psychological sense.

## III. Front Pay Liability

Although reinstatement is "the preferred remedy to cover the loss of future earnings," **Nolan v. AC Express**, 92-STA-37 (Sec'y 1/17/95), front pay may be awarded in the appropriate circumstance. This Judge, in reaching a determination of whether Complainant is entitled to front pay, has given due consideration to the totality of the circumstances. **See Generally Smith v. World Ins. Co.**, 38 F.3d 1456 (8th Cir. 1994). The record does not evidence a work environment sufficiently hostile to warrant rejection of the offer on that basis alone. For example, there were no adverse work performance reviews in retaliation for Complainant's protected activities.[7] (TR 138) The most

[7]There was an October 1993 evaluation which noted Complainant spent a lot of time talking to other drivers when he should have been working. (RX 14) This evaluation, however, pre-dated Complainant's engagement in protected activities. The Board has held that Complainant's complaints to his managers about the 'vicious cycle' and/or Complainant's acts of copying his time cards and his own manifests constituted protected activity. (DRO, at p. 5)

controversial encounters were in November 1993 when Alex Kasny, Respondent's operations supervisor, told Complainant to get the STA regulations out of 'his thick skull' and insisted Complainant come in two hours earlier for Complainant's shift (TR 109) and when Michael Greany, Respondent's terminal manager, shook Complainant's hand and told him it was nice knowing you. (TR 112) While not warming conversations, these are considerably less than the razor-sharp, acerbic exchanges that are from time to time seen in so-called whistleblower litigation and which, on occasion, justify an award of front pay in lieu of reinstatement. I am also unpersuaded by Complainant's attempt to show a hostile environment by citing to Respondent's conduct throughout this litigation. In this regard, **see Creekmore**, **supra** at p. 18 (wherein the Deputy Secretary stated "the observed tension between the parties at the hearing is not sufficient to demonstrate the impossibility of a productive and amicable working relationship).

This, however, is not the end of the inquiry. Front pay is a special remedy warranted by egregious circumstances. **Lewis**, 953 F.2d at 1281. It is a matter of fact that this Complainant suffers from major depression occasioned by Respondent's wrongful conduct. Furthermore, it is an uncontroverted fact that a treating physician has specifically advised Complainant not to return to work in that environment for health reasons. Beyond these medical issues, there is also the fact that the management person who terminated Complainant was also the same person whom Complainant was supposed to contact in regards to reinstatement and the fact that the offer of reinstatement was not extended until a year and a half after termination. These facts necessarily influence my decision to award front pay, rather than reinstatement, because they indicate the environment to which Complainant could anticipate returning and, indeed, inferentially verify Complainant's concerns about returning to Respondent company in an atmosphere where the employer might be trying to get rid of him.

I have also been guided by Dr. Farrand's testimony as to the vicious cycle in which the Complainant is caught and the sort of modified job that would be necessary to ease Complainant back into a stable mental state. (TR 391-92) In addition, the Doctor stated he was unable to establish how long it would take for Complainant to complete this rehabilitation, if you will, and return to regular employment. It is also of significance that both Dr. Farrand and Ms. Palmer were of the opinion that Complainant was not responding well to the anti-depressant medication and therapy sessions and that he continued to suffer from major depression.

Accordingly, I find and conclude that a front pay award for a period of two years is justified by the medical evidence of record. I have modified Complainant's request for three years front pay because of the potential for windfall inherent with the remedy.

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These acts began in November 1993 and concluded in December 1993. (DRO, at pp. 3-4)

## IV. Medical Benefits

Complainant is entitled to an award of health, pension and other related benefits which are terms, conditions and privileges of employment from the date of the discriminatory layoff until reinstatement or declination of an offer of reinstatement. **See Creekmore**, **supra**, at pp. 21-22 (**Citing** 42 U.S.C.A. §5851(b)(2)(B)). Such compensable damages include medical expenses incurred because of termination of medical benefits, including premiums for family medical coverage. **Id. See Also Crow v. Noble Roman's Inc.**, 95-CAA-8 (Sec'y 2/26/96).

At the February 1996 hearing, the parties stipulated Complainant would have benefitted from health insurance having a net value to Complainant of $369.00 per month or $85.15 per week beginning January 1, 1994 and continuing until December 1995. It was further stipulated that the net value of such health insurance rose to $399.00 per month or $92.08 per week beginning January 1996 and continuing to present.

Accordingly, I find and conclude that Complainant is entitled to an award of these medical benefits and the parties have already calculated the health insurance benefit amount into their stipulation regarding back pay. (**See** Stipulation Number 3(e)) In addition to those amounts, Respondent shall reimburse Complainant for any costs Complainant personally incurred relative to health care which would have been covered under the Respondent's health care program. This necessarily includes any health care costs incurred by Complainant's wife and any dependents who would have been covered by that health care program if Respondent had not discriminatorily discharged Complainant.[8]

Furthermore, Respondent shall reimburse Complainant for any health care costs associated with the diagnosis and treatment of Complainant's depression, including any counseling and medication expenses, regardless of whether that care and treatment would have been covered by Respondent's health care program. These expenses are the responsibility of Respondent because, as this Judge has already found, that psychological state was caused by Respondent's wrongful conduct.

Finally, Complainant is entitled to an award of health benefits extending from the date that payment of this judgment is remitted and continuing for the two year period of front pay. Respondent shall also be liable for those medical expenses as heretofore specified for the same two year period.

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[8]I pause to note that there is evidence of record which indicates some or all of Complainant's medical expenses incurred between his date of termination and the date of hearing have been paid by Medicare and/or Medicaid. (**See Generally** CX 9) In this regard, Respondent shall remit reimbursement directly to that government sponsored program.

## V. Compensatory Damages

Complainant requests this Judge award $200,000.00 to Complainant as compensatory damages for the "utter humiliation and despair" experienced by Complainant as the result of Respondent's retaliatory discharge. (Complainant's Brief, at p. 14) Complainant argues "The Respondent, in short, ruined [Complainant's] life simply because [Complainant] chose to comply with federal hours-of-service regulations." (Complainant's Brief, at p. 15) Complainant supports this statement by arguing the evidence of record establishes Complainant is overwhelmed with feelings of hopelessness, helplessness, anger, shame, and fears for his future; that Complainant is deprived of pleasure in all or almost all activities and that he experiences feelings of worthlessness and extreme guilt because he cannot provide for his family; and that Complainant will likely lose his home through foreclosure and feels harsh indignity because he must rely on public assistance. Furthermore, Complainant argues, Respondent's conduct took Complainant's marriage to the "brink of irretrievable breakdown." (**Id.**)

Respondent opposes Complainant's request for compensatory damages on the basis that such damages are not statutorily authorized. Respondent attempts to convince this Judge that the statutory language "pay compensatory damages, including back pay" must be interpreted to exclude from compensatory damages emotional suffering, psychic injury, and medical expenses. In this regard, Respondent directs my attention to contemporaneous discrimination laws and their progeny, as well as to Congress' silence on the meaning to be attached to the term 'compensatory damages' as used in the STA. (Respondent's Brief, at pp. 5-8)

Contrary to Respondent's assertion, it has been held that "[t]he STA ... authorizes compensatory damages, which may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation." **Nolan v. AC Express**, 92-STA-37 (Sec'y 1/17/95), at p. 9 (**Citing Deford v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983) (under analogous provision of the ERA); **Webb v. City of Chester, Ill.**, 813 F.2d 824, 836-37 and nn. 3,4 (7th Cir. 1987)). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 95-STA-37 (ALJ 5/8/96) (adopted by ARB 9/5/96). **See Also Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/30/91). Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Bigham**, 95-STA-37 (ALJ 5/8/96), at p. 14; **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92), at p. 7 (Citation Omitted). The amount of the compensatory award, if any, clearly depends upon such factors as the seriousness of the emotional ramifications and the credibility and/or substantiation of evidence presented on the issue.

The Board has found it appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in whistleblower cases. Accordingly, this is precisely what this Judge has done. **See Doyle v. Hydro Nuclear Services**, 89-ERA-22 (ARB 9/6/96)

(wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages)[9]; **Bigham**, 95-STA-37 (ARB 9/5/96) (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress)[10]; **Creekmore**, **supra** (wherein the Board upheld this Judge's award of $40,000 after reviewing complainant's evidence of emotional distress)[11]; **Gaballa v. Atlantic Group, Inc.**, 94-ERA-9 (Sec'y 1/18/96) (wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000 to $25,000)[12]; **Marcus v. United States Environmental Protection**

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[9]The evidence which supported an award in this amount consisted of complainant consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[10]At hearing, complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

[11]In **Creekmore**, the Board noted ample evidence which justified an award of substantial compensatory damages. The Board specified complainant's credible testimony that his layoff caused him embarrassment in seeking a new job, emotional turmoil due to the disruption to his family life brought on by his temporary consulting work and eventual relocation, and panic about being able to meet his financial obligations. The Board stated that although it had reservations about whether complainant's heart attack was the "natural sequela" of his layoff, it held an award of $40,000 was nevertheless justified in light of the demonstrated panic, embarrassment, pain and suffering.

[12]The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent who had previously settled out of the case and that part of that settlement compensated for part of complainant's compensatory damages.

**Agency**, 92-TSC-5 (ALJ 12/3/92) (adopted by Sec'y 2/7/94) (wherein the Secretary adopted the ALJ's recommended compensatory damages award in the amount of $50,000)[13]; **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92) (wherein the Secretary reduced the compensatory award from a recommended amount of $20,000 to $10,000)[14]; **McCuistion v. Tennessee Valley Auth.**, 89-ERA-6 (Sec'y 11/13/91) (wherein the Secretary increased compensatory damages from the ALJ's recommended award of $0 to $10,000)[15]; **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (8/16/93) (wherein the Secretary reduced the ALJ's recommended award of compensatory damages to 5,000).[16]

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[13]This award rested on complainant's testimony that bringing the case had disrupted his home life, that his children's college plans were changed because of the financial burden of unemployment, that he gained weight and developed a blood pressure problem, that his stomach was in an uproar, and that he had feelings of great depression. In addition, complainant testified to an incident where he was physically grabbed by agents of the respondent and that he felt like a criminal because of these agents' aggressive and intimidating behavior. Finally, complainant testified that he suffered harm to his reputation caused by respondent distributing to other supervisors information stating complainant's behavior was violent and aggressive.

[14]In **Lederhaus**, the evidence established complainant remained unemployed for 5 ½ months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a gift, the family did not have their usual Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and a neighbor. Complainant contemplated suicide twice.

[15]The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least one occasion. Complainant experienced problems sleeping at night, exhaustion, depression, and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive abut his blood pressure.

[16]The testimony of complainant, his wife, and his dad established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really in a low and that he relied on his dad to come out of depression. The

This Judge, viewing Complainant's request for compensatory damages in the amount of $200,000.00 in light of these cases, states it seems appropriate to categorize the request under consideration as high. I also decline to award such an amount based on my finding that the evidence of record fails to establish emotional ramifications sufficiently serious to warrant such an award.

Complainant testified that his Doctor and wife have stated his relationship with family has changed, and Complainant acquiesced "I guess it's got to be true." (TR 181) Complainant's wife of six years, Mrs. JoAnne Michaud, also testified at hearing. Mrs. Michaud described her husband's personality in 1982 as "energetic...he liked going just for rides...he used to be a lot of fun...he was quite happy, he was quite a lot of fun." (TR 296) She also recounted a 1984 car accident which left Complainant unemployed until 1986 and Mrs. Michaud observed no personality change. Mrs. Michaud then proceeds to describe Complainant between 1986 and 1993 as "romantic still." (TR 298)

On the one hand, Mrs. Michaud testified she noticed changes about a year after Complainant's firing when Complainant started getting moody and snappy, when he did not want to do anything and did not want to leave the couch, and when he would leave the house to look for a job and come home even worse. (TR 302-303; 307; 327) Mrs. Michaud stated she could not talk with her husband anymore and that when they were in the same room they would usually fight, so she did not want to remain in the same room with him. The Michauds stopped sleeping in the same room and Mrs. Michaud testified that she considered leaving her husband. Mrs. Michaud attributed the cause of marital problems to "[Complainant] not working" and to the fact that "[Complainant] stressed himself out very much over that." (TR 310)

On the other hand, Mrs. Michaud testified Complainant was working or sleeping during 1993 and she hardly spoke to him at all. According to Mrs. Michaud, Complainant slept most of the day when he was not working and he was also getting headaches and was exhausted. (TR 318) In fact, Mrs. Michaud states that although she knows her husband was fired, she did not know why and she never asked why. (TR 325) Furthermore, Mrs. Michaud only knows her husband went out looking for work - she knows no other particulars of his job search nor does she know why he gave it up. (TR 325; 327)

It is apparent from this testimony, and clear from counsel's cross-examination of Mrs. Michaud, that the purported impact on Complainant's marital relationship is questionable. Mrs. Michaud herself states that she did not notice a change in her husband's personality until approximately a year after his termination from Respondent, yet it is also obvious from her lack of knowledge about Complainant's firing and subsequent job search that communication between the two may not have been ideal during that intervening period.

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termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

While this Judge does find Complainant's claim for compensatory damages to be somewhat enhanced, I also find valid basis for a modified award of such damages. Furthermore, it is important to note that this Judge is also of the opinion that the evidence in this case justifies an award somewhat higher than the aforementioned cases. There is concrete evidence in the form of three Doctors' reports which substantiate and lend credulity to the testimony of Complainant and Mrs. Michaud in regards to Complainant's extreme depression. Specifically, this Court is guided by the medical report of Ms. Delphine Palmer, LCSW, which report is validated by the consulting report of Dr. Garnett, and the report of Dr. Farrand. All three of these reports, which have been thoroughly summarized above, indicate Complainant's presentation with complaints of symptoms suggestive of depression. This Judge finds it significant that not one of these three medical professionals casts doubt about the veracity of Complainant's complaints and that Doctor Farrand actually administered an objective test to assist in the assessment of Complainant's condition.

This Judge cannot reconcile Respondent's attempt to discredit Complainant's claims as to the psychiatric repercussions of Respondent's acts with Respondent's failure to offer contravening medical evidence. Even if I were to accept Respondent's argument and discredit Complainant's self-reports of stress, anxiety and other symptoms common to depression, the fact remains that I have the well-reasoned and well-supported medical reports of examining medical professionals. Indeed, Ms. Palmer stated at hearing that Complainant's self-report and information given over time "pretty much stick to the same themes or topics." (TR 366)

Finally, I shall address Respondent's argument that Complainant has failed to prove by a preponderance of the evidence that Respondent's termination of his employment was the proximate cause of his damages. To wit, Respondent states Complainant's financial and life problems started long before his employment was terminated; Complainant did not see a Doctor until fourteen months after the termination; Complainant experienced no medical problems at all between December 1993 and February 1995; Complainant did not consult a Doctor in February 1995 for emotional problems but rather for a skin rash; and that Complainant's emotional problems started in or about March 1995, after Complainant was rejected for employment by another employer. Respondent claims Complainant's "'proof' of proximate causation is all based on [Complainant's] subjective, uncorroborated misperceptions."[17] (Respondent's Brief, at p. 9)

Au contraire, the evidence of record demonstrates three examining physicians directly opposed to argument of Respondent's counsel. While the facts as summarized by counsel are for the most part

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[17]This Administrative Law Judge shall note Respondent states in its brief "the Secretary cannot find that the Complainant has proven by a preponderance of the evidence that the December, 1993 employment termination was the proximate cause of his various alleged emotional damages." (Respondent's Brief, at p. 9) This Judge is of the opinion that the Respondent has misconstrued the Board's DRO. The Board, in fact, remanded to the Office of Administrative Law Judges for further proceedings deemed necessary and for a finding on the issue. Nowhere in the DRO did the Board intimate an opinion as to whether or not Complainant had met his burden on this issue.

accurate,[18] the inference to be drawn from those facts was, quite properly, explained by Complainant's witnesses, Dr. Farrand and Ms. Palmer, and Dr. Garnett's medical report. I find and conclude the medical evidence of record establishes that element of proximate cause which Respondent attempts to defeat solely on the basis of argument of counsel. **Cf. Creekmore**, **supra**, at pp. 22-24 (wherein the Board expressed doubt about complainant's heart attack being the "natural sequela" of the respondent's unlawful conduct based upon the *conflicting* medical evidence).

In view of the foregoing, I find and conclude that a compensatory damage award in the amount of $75,000 is warranted. While factors such as Respondent's choosing to terminate Complainant days before Christmas and while Complainant was awaiting the arrival of his first child, impairment to Complainant's marital relationship and financial situation, and the aggravation of physical conditions such as recurrent headaches and stomach pain and the onset of chest pain due to Complainant's psychological state have played a role in granting these damages, this award is based, in particular, on the extreme degree of Complainant's medically diagnosed depression and all of its attendant symptoms, the unlikelihood of that depression resolving in the near future, and the disabling effect that depression had and continues to have on Complainant's ability to seek other employment.

## VI. Attorney's Fee

A. Hourly Rate

In calculating attorney fees under the STA, 49 U.S.C. §2305(c)(2)(B), it is usual to use the lodestar method which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. In this regard, **see Clay v. Castle Coal and Oil Co., Inc.**, 90-STA-37 (6/3/94), at p. 4. A Fee Request and Supplemental Fee Request[19] have been submitted which request, in total, $50,437.39[20] (including expenses).

Complainant's counsel, Louis B. Butterfield, requests an hourly rate of $120.00 per hour for services rendered. In support of this rate, Attorney Butterfield has submitted a thorough, personal affidavit, attesting to his education and professional experience. In addition, Attorney Butterfield has

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[18]The evidence does not necessarily establish that Complainant's economic situation pre-dated his termination from Respondent corporation. (TR 171-181; 251; 253)

[19]Complainant's counsel has indicated he will be submitting a further supplement to his fee petition for services performed post-April 1997. Counsel is hereby **NOTIFIED** that this Administrative Law Judge relinquishes jurisdiction over this matter upon issuance of this Recommended Decision and Order. Accordingly, any further supplement to the fee petition shall be filed with and addressed by the Administrative Review Board.

[20]I reach this total by adding the first application, totaling $45,282.53, to the supplemental application which, according to my calculation, totals *$5,154.86*.

submitted affidavits from his professional peers which state the requested fee is, in fact, *within or below* the prevailing rate in the state of Maine. **See** Affidavit of David G. Webbert, at para. 4; Affidavit of Timothy H. Norton, at para. 4; Affidavit of William L. Vickerson, at para. 3. Counsel also seeks a rate of $120.00 per hour for time expended by his partner and a rate of $50.00 per hour for time expended by the firm's paralegal.

Respondent has objected to the requested hourly rate on the basis that a fee agreement entered into in February 1996 provided a lesser rate and that the bankruptcy court "apparently approved"[21] that lesser rate. Respondent proposes an adjusted rate of $115.00 per hour.

I find and conclude that a rate of $120.00 per hour for Attorney Butterfield is reasonable and supported by affidavit. Counsel attested to outstanding scholastic achievement, including the facts that he ranked second in his class at University of Maine School of Law and served on the Board of Editors for the Maine Law Review, and impressive professional experience, for example his employment with a labor and employment firm and his participation in founding an employment section in one of Maine's largest firms. Furthermore, a rate of $120.00 per hour appears most reasonable in light of the fact that Attorney Butterfield's contemporaries have attested that the requested rate is *within or below* the prevailing rate in Maine.

B. Hours Expended

Complainant's counsel is entitled to recover for those hours reasonably expended on the pending matter. Complainant's counsel requests reimbursement for a total of 386.30 hours spent on this matter. In support thereof, counsel has submitted an itemized statement for services rendered with corresponding time spent. **See** Complainant's Brief, Exhibit 2. The period of representation extends from January 10, 1995 to April 30, 1997 - a period of roughly two (2) years and three and a half (3½) months. Within this time frame, counsel conducted and completed discovery, prepared for and participated in the initial hearing before the Office of Administrative Law Judges in which the determination was adverse to Complainant, successfully convinced the Board to find a violation of the STA had occurred, and continued to represent Complainant during remand for a determination of damages.

Respondent has proposed I disallow certain services requested on the basis that the services are co-mingled with non-chargeable time, **i.e.**, time spent assisting Complainant in matters not related to his STA claim. I concur to some extent.

I find and conclude that Attorney Butterfield's determination of whether to represent Complainant in this STA matter is compensable as it relates to Complainant's STA claim. In this regard, I have concluded it is proper to allow the fee petition for those services rendered on January 10th and 17th, 1995. I do, however, find a request of 4.4 hours for that determination is unreasonable.

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[21]This Judge, upon review of Complainant's Fee Petition, is unable to agree with Respondent's representation that the Bankruptcy Court "apparently approved" that rate. Indeed, Complainant's counsel addresses this characterization in EX O.

This Judge concludes that 1.5 hours would have been a sufficient, reasonable amount of time for Attorney Butterfield to determine whether to represent Complainant and, accordingly, I reduce Attorney Butterfield's fee petition by 2.9 hours.

There are also a number of entries which I do not have the authority to award. These entries pertain to counsel's consideration of other possible claims and entries pertaining to mortgage, foreclosure and bankruptcy issues. Specifically and upon behest of Respondent, I have eliminated the following entries from counsel's fee petition:

| Date of Entry | Time Not Allowed |
|---|---|
| 11/08/95 | .40 |
| 11/09/95 | .25 |
| 06/07/96 | .30 |
| 08/23/96 | .70 |
| 10/02/96 | .10(partially allowed for other identified compensable services) |
| 10/21/96 | .30 |
| 12/30/96 | .30 |
| 01/14/97 | .25 |
| 01/22/97 | .20 |
| 01/24/97 | .30 |
| 02/28/97 | .30 |
| 03/04/97 | .45(partially allowed for other identified compensable services) |
| 03/11/97 | .20 |
| 04/09/97 | 3.60 |
| 04/14/97 | .30 |
| 04/23/97 | .10 |
| TOTAL = | 8.05 |

I reject Respondent's argument that other services be disallowed as "fruitless settlement" negotiations or "wasted internal communications." It remains that even if these services were 'fruitless' or 'wasted,' they were rendered in connection with the resolution of this matter and thus are compensable.

Respondent has also objected to Complainant's attorney requesting a fee at a rate of $115 or $120 per hour for the time spent traveling and serving subpoenas and suggests a reduced rate of $25.00 per hour. I agree with Respondent on this point and will reduce the rate charged for this service to $25.00 per hour. This Judge does not deem it reasonable to compensate Complainant's attorney at an attorney's hourly rate for a service that does not require lawyerly skills and is a function that could be performed by certified mail or by any person over 18 years of age. **See** 29 C.F.R. Part 18.24(a). I do, however, find that travel time to and from the actual hearing of this matter in February 1996 is compensable at an attorney's rate.

In addition, Respondent argues this Judge should reduce the number of hours billed for certain services as excessive. Respondent directs my attention to 69.30 hours billed for Complainant's post-trial brief, 38.90 hours billed for brief on appeal, and 8.70 hours billed for motion for modification. I am, however, not able to find these hours so unreasonable as to warrant a reduction.

Accordingly, I reduce the fee request by 10.95 hours at a rate of $120.00, for a reduction of $1314.00, and I adjust the requested fee for serving subpoenas to a rate of $25.00 per hour for 3.00 hours,[22] for a reduction of $285.00.

C. Expenses Incurred

In addition to an attorney's fee for services, a successful complainant is entitled to reimbursement of the costs in bringing and prosecuting the complaint. **Sickau v. Bulkmatic Transport Co.**, 94-STA-26 (Sec'y 10/21/94) (**Citing** 49 U.S.C. §2305(c)(2)(B)). Complainant seeks expenses in the amount of $4,494.39 and I find and conclude that this amount is sufficiently identified by Attorney Butterfield's affidavit, **see** para. 20, and Exhibit 3.

## VII. Pre-Judgment Interest

Complainant is entitled to pre-judgment interest on his back pay award, calculated in accordance with 26 U.S.C. §6621. Complainant is not entitled to interest on his attorney fee award, **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/30/91), at p. 12-13, **aff'd sub nom.**, **Blackburn v. Martin**, 982 F.2d 125 (4th Cir. 1992), nor does interest accrue on the compensatory damage award. **Creekmore**, **supra**, at p. 25 (**Citing Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92), at p. 16; **McCuistion v. Tennessee Valley Auth.**, 89-ERA-6 (Sec'y 11/13/91), at p. 24).

[22]I note that there are other compensable services included in the time billed on 2/15/96, 2/19/96 and 2/21/96. Therefore, I have adjusted one hour of each day from a $120.00 per hour rate (attorney rate) to a $25.00 per hour rate (service of process rate).

## ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I **RECOMMEND** Complainant, Robert Michaud, be awarded the following remedy:

Respondent, BSP Transport, Inc., shall remit to Complainant, Robert Michaud,

1. Back pay in the amount of $66,204.38 for the period of December 23, 1993 through December 31, 1995;

2. Back pay at the rate of $655.14 per week for the period of January 1, 1996 through the date Respondent remits payment of this award;

3. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. §6621;

4. Front pay in the amount of $68,134.56 (which is $655.14, the stipulated weekly compensation rate, times 104 weeks);

5. Reimbursement of those medical costs as identified in part IV of this Recommended Decision and Order;

6. Compensatory damages in the amount of $75,000.00; and

7. Attorney's Fee in the amount of $48,838.39 (expenses included).

It is **FURTHER RECOMMENDED** that

1. Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination;

2. Respondent shall designate an individual within Respondent's organization as the person to be contacted as Complainant's employment reference and this individual shall provide an employment reference free from reference to Complainant's protected activity; and

3. Respondent shall post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of thirty (30) days, advising its employees that the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaint has been decided in his favor.

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**DAVID W. DI NARDI**
**Administrative Law Judge**

Boston, Massachusetts
DWD:jw:

**NOTICE**: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. The Administrative Review Board is the authority vested with the responsibility of rendering a final decision in this matter in accordance with 29 C.F.R. Part 24.6 pursuant to Secretary's Order 2-96, 61 Federal Register 19978 (May 3, 1996).